UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PHILLIP G. HILLEN, Appellant, v. DEPARTMENT OF THE ARMY, Agency, and OFFICE OF THE SPECIAL COUNSEL, Intervenor.	DOCKET NUMBER DC07528510324-1 DATE: NOV 23 1987

Edward H. Passman, Esquire, Passman and Broida, Washington, D.C., for the appellant.

William J. Merrigan, Esquire, and Sam Horn, Esquire, Falls Church, Virginia, for the agency.

Bruce D. Fong, Esquire, Office of the Special Counsel, Washington, D.C., for the intervenor.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

Member Devaney concurs in the result.

OPINION AND ORDER

The Office of Special Counsel and the agency have petitioned for review of the administrative judge's second initial decision, issued on June 13, 1986, that did not

sustain the agency's removal of the appellant.[1] For the reasons set forth below, the Board GRANTS the petitions. The initial decision is VACATED and the case is REMANDED to the Washington Regional Office for further adjudication in accordance with this Opinion and Order. Further, for the reasons set forth below, the Board DENIES the appellant's cross petition for review. 5 C.F.R. § 1201.115.

BACKGROUND

Agency Action.

The agency removed the appellant, a Senior Executive Service official of the Military Traffic Management Command (MTMC) for sexual harassment of five female employees at the command. The charge resulted from investigations initiated by a complaint filed with the Inspector General's (IG) office by Captain Nancy Daugherty. After investigation, the Inspector General's report found that the appellant had sexually harassed Captain Daugherty and another woman and engaged in inappropriate behavior with two additional women. Because the Office of the Inspector General did not release the evidence supporting its report, the command then initiated its own investigation on which it based this removal action.

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[1] We have not considered Part II of the agency's response to the appellant's cross-petition for review, since the Board's regulations do not provide for submission of a reply to the response to a petition for review. *See* 5 C.F.R. § 1201.114.

First Initial Decision.

The appellant appealed his removal to the Board's Washington Regional Office. After hearing testimony from Major General Harold S. Small (the deciding official), Captain Daugherty, Ms. Geneva Byars, and Ms. Jan Ingerski, the administrative judge granted the appellant's motion for summary judgment. He found that the appellant's conduct did not constitute sexual harassment and issued an initial decision not sustaining the agency action. The agency petitioned for review of the administrative judge's initial decision. The Office of the Special Counsel (OSC) intervened and also petitioned for review of the initial decision.

Board Remand.

In a decision dated January 28, 1986, the Board found that the administrative judge had erred in granting the appellant's motion for summary judgment, and that the agency had established a prima facie case of sexual harassment against the appellant with regard to the specification concerning Captain Daugherty and the portion of the specification regarding the appellant's touching of Ms. Byars. The Board further found that the appellant's conduct toward Ms. Schaefer could constitute sexual harassment, but that the record contained insufficient information about the context of the conduct and its effect. Accordingly, the case was remanded to the regional office for completion of the hearing and issuance of a new initial

decision. *Hillen v. Department of the Army*, 29 M.S.P.R. 690 (1986). Specifications concerning three women remained in issue.

The first of these three women, Captain Nancy Daugherty, alleged that, in the fall of 1983, the appellant crossed an elevator in which they were riding and took her hand, which she had tucked under her arm for warmth. In the process of taking her hand, the appellant touched her breast. Several months later the appellant entered her office and rubbed his hand down her buttocks and thigh. The appellant claimed he was brushing a chalky substance off her skirt. Several weeks after that incident, Captain Daugherty answered the telephone in her office. After identifying her department and herself, she asked, "May I help you, sir?" The appellant, without immediately identifying himself or stating his business, responded, "What would you like to do?" He repeated the remark before identifying himself and asking to speak with her supervisor. Captain Daugherty also stated that the appellant had a practice of looking at her in a sexually suggestive manner. The appellant was charged with this conduct under Specification a. Agency File, Tab B-9.

The second of the three women whose allegations remained at issue was Ms. Geneva Byars. Ms. Byars alleged that the appellant engaged in unwelcome touching of her. (In her hearing testimony, Ms. Byars stated that on one occasion the appellant touched her breast.) The appellant

was charged with this conduct under Specification b. Agency File, Tab B-9.

The third woman, Ms. Cynthia Schaefer, alleged that, in approximately 1981, when she was a Clerk-Typist, the appellant frequently stopped her in the hallway. The appellant expressed an interest in having her join his intern program and invited her to his office to discuss it. The appellant persisted, although Ms. Schaefer told him that she was not interested in the intern program and that her supervisor was assisting her to find an upward mobility position. On one occasion during a hallway encounter, the appellant blocked her so that she could not easily leave the area. Her supervisor, Mr. Andrews, stated that Ms. Schaefer came to him in approximately 1983 to ask him whether she had to go to the appellant's office when the appellant asked her to, and Mr. Andrews advised her that she did not have to go. Ms. Schaefer also complained that the appellant looked at her body in a sexually suggestive way. The appellant was charged with this conduct under Specification e. Agency File, Tab B-9.

Second Initial Decision.

On remand, the administrative judge took additional testimony. He issued a new initial decision on June 13, 1986, again finding that the appellant's conduct did not constitute sexual harassment. The administrative judge found that the appellant had not touched Ms. Byars's breast and that the appellant's other actions were not of a sexual

nature, were not pervasive, and did not affect the psychological well-being of the women.

Petitions for Review of Second Initial Decision.

On July 16, 1986, the OSC, as intervenor, filed its petition for review of the second initial decision, contending that the administrative judge erred in his interpretation of 29 C.F.R. § 1604.11(a), the regulation governing sexual harassment claims, and that the administrative judge's factual findings were not supported by the record. The agency also has filed a petition for review contending that the administrative judge erred in his interpretation of the law regarding sexual harassment and in his factual findings. The appellant has responded to the petitions for review, disputing the arguments made by the agency and OSC, and has submitted a cross petition for review, alleging that the administrative judge erred by failing to admit polygraph evidence.

DISCUSSION AND ANALYSIS

The administrative judge failed to resolve essential credibility issues and to provide adequate support for the credibility findings that he did make.

As the Board has consistently stated, an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law. *See, e.g., Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). The initial decision on remand fails to meet these standards, particularly with regard to

the administrative judge's responsibility to resolve credibility issues.

To resolve credibility issues, an administrative judge must first identify the factual questions in dispute; second, summarize all of the evidence on each disputed question of fact; third, state which version he or she believes; and, fourth, explain in detail why the chosen version was more credible than the other version or versions of the event. Numerous factors, which will be considered in more detail below, must be considered in making and explaining a credibility determination. These include: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor.

1. The Opportunity and Capacity to Observe the Event or Act.

Personal knowledge of the event or act at issue is an essential qualification of a witness, and the requisite personal knowledge is established by evaluation of the witness's opportunity, as to place, time, proximity, and similar factors, to observe the event or act in issue. 3A Wigmore on Evidence § 1005(f) (Chadbourne rev. 1970). These factors relating to a witness's opportunity to observe

are material in determining the witness's credibility. *Id.* *See, e.g., Pitchford v. Department of Justice*, 14 M.S.P.R. 608, 612-13 (1983) (the administrative judge erred by not crediting witnesses who were close enough to the disputed events to know that a verbal exchange between the appellant and his superior did not occur). The witness's capacity to observe refers to his or her ability to understand what was seen and intelligently narrate it. 3A Wigmore on Evidence § 993 (Chadbourne rev. 1970). *See, e.g., Wright v. Department of Transportation*, 24 M.S.P.R. 550, 553 (1984) (the appellant's version of a meeting was credible because it was based on contemporaneous notes made immediately after the meeting).

2. Character.

Character evidence may be used for impeachment of a witness on the theory that certain characteristics render that person more prone to testify untruthfully. 3 Weinstein's Evidence, para. 608[01] (1985). This form of impeaching evidence may be established by prior misconduct or reputation. *See, e.g., Stewart v. Office of Personnel Management*, 8 M.S.P.R. 289, 297 (1981) (previous falsification diminishing credibility); *Pedersen v. Department of Transportation*, 9 M.S.P.R. 195, 198-99 (1981) (poor reputation for truthfulness diminishing credibility).

3. Prior Inconsistent Statement.

The effect of a prior inconsistent statement is not that the present testimony is false but that the very fact

of the inconsistency raises doubt as to the truthfulness of both statements. 3 Weinstein's Evidence, para. 607[06] (1985), quoting McCormick on Evidence, § 34 (1954). The form of the inconsistency, whether oral, in writing, or by conduct, is immaterial and the statements or conduct need not be in direct conflict. 3A Wigmore on Evidence §§ 1040(1),(2), and (5) (Chadbourne rev. 1970). *See, e.g., Greco v. Department of Transportation, Federal Aviation Administration*, 15 M.S.P.R. 210, 215 (1983) (failure of the appellant to deny the charges when responding to the proposed adverse action makes a subsequent denial less credible); *Schaefer v. Department of Justice*, 25 M.S.P.R. 277, 281 (1984) (it is not error for an administrative judge to accord little weight to an affidavit inconsistent with two prior statements by the witness). Inconsistencies, however, do not necessarily render testimony incredible. *See, e.g., Cochran v. Department of Justice, Immigration and Naturalization Service*, 16 M.S.P.R. 343, 347 n.2 (1983) (inconsistencies found to be inadvertent).

4. Bias.

The possibility of bias is always significant in assessing a witness's credibility. Bias rests on the assumptions that certain relationships and circumstances impair the impartiality of a witness and that a witness who is not impartial may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties. Weinstein's Evidence para. 607[03] (1985). The

trier of fact must be sufficiently informed of the underlying relationships, circumstances, and influences operating on the witness, so that in the light of his or her experience, he or she can determine whether a mutation in the testimony could reasonably be expected as a probable human reaction. *Id.* *See, e.g., Paniagua v. General Services Administration,* 23 M.S.P.R. 229, 233 (1984) (the attempt of the appellant's estranged wife to have him fired and her unjustified accusations that the appellant engaged in theft, lying, and various other improprieties leads to questioning of her credibility); *Bowers v. United States Postal Service,* 3 M.S.P.R. 562, 564-65 (1980) (the administrative judge's failure to consider evidence that the agency had coerced at least one witness and the impact of coercion on the credibility of all the witnesses was error).

One aspect of bias is the question of self-serving testimony. Although the fact that a witness's testimony may be self-serving does not by itself provide sufficient grounds for disbelieving that testimony, it is a factor for consideration in assessing the probative weight of the evidence. *See Spezzaferro v. Federal Aviation Administration,* 807 F.2d 169, 173 n.2 (Fed. Cir. 1986); *Sanders v. United States Postal Service,* 801 F.2d 1328, 1332 (Fed. Cir. 1986); *Hall v. Veterans Administration,* 7 M.S.P.R. 161, 162-63 (1981).

5. Contradiction by or Consistency with Other Evidence.

Contradiction is the calling of one or more witnesses who deny the fact or facts asserted by another witness and maintain that the opposite is the truth; the contradiction in itself does nothing probatively unless the contradicting witness or witnesses is believed in preference to the first witness. 3A Wigmore on Evidence, § 1000 (Chadbourne rev. 1970). Contradiction rests on the inference that if a witness is mistaken about one fact, he or she may be mistaken about more facts and therefore his or her testimony is untrustworthy. 3 Weinstein's Evidence, para. 607[05] (1985). *See, e.g., Seavello v. Department of the Navy,* 4 M.S.P.R. 155, 157 (1980) (testimony that witness retrieved illegally produced posters from a beauty shop was discredited by contradictory testimony of present and former owners of the shop). *But see Glenroy Construction Co. Inc. v. NLRB,* 527 F.2d 465 (7th Cir. 1975) (merely because a witness is not contradicted, it does not necessarily mean that his or her testimony is to be credited); *Antonucci v. Department of Justice,* 8 M.S.P.R. 491 (1981) (discrediting of a witness on one issue does not require the administrative judge to discredit the witness on all other issues).

On the related topic of polygraph evidence, the Board has previously stated that the admissibility of polygraph results is a matter within the authority of the administrative judge. *See Meier v. Department of Interior,* 3 M.S.P.R. 247, 253 (1980). In finding polygraph results

admissible, the Board does not imply that the results of such a test must be accepted into evidence. *Id. Compare, United States V. Gordon,* 688 F.2d 42, 45 (8th Cir. 1982) (it was not an abuse of discretion for a trial court to exclude the results of one exculpatory and one inconclusive polygraph examination).[2]

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[2] It is with regard to this aspect of credibility determinations that the appellant's contention in his cross petition for review -- that the administrative judge erred in not admitting the results of his second voluntary polygraph test -- must be considered.

Prior to the first hearing, the appellant requested as a witness Mr. Howard L. Miller, the licensed polygraph operator who conducted two polygraph examinations of the appellant. The results of the first examination were presented to the deciding official as part of the appellant's response to his proposed removal, and, therefore, are part of the agency case file. Agency File, Tab B-5-2. The deciding official considered the polygraph results but found them unpersuasive. Agency File, Tab B-1, paragraph 11 at 3.

In addition to requesting Mr. Miller as a witness, the appellant also submitted a letter which represented the results from his second polygraph test. Appeal File, Vol. 1, Tab 9. In this second letter, Mr. Miller found the appellant truthful in his denials of touching Ms. Byars's breast and rubbing Captain Daugherty's buttocks and thigh. The administrative judge declined to admit these results because he did not believe that the projected testimony would be probative of the issues since it was being offered to buttress the appellant's claim of truthfulness, rather than for impeachment, and because he wished to make his own credibility determinations. Tr. I at 4.

Based upon our review of the record, we find that the administrative judge did not abuse his discretion in refusing to admit into evidence the results of the appellant's second polygraph examination. Because of our decision with regard to the adequacy of the administrative judge's credibility determinations, he may, on the remand, reconsider his decision to exclude the results of the second polygraph examination. In the event that he does so, he must also allow the agency the opportunity to rebut the appellant's polygraph evidence.

6. Inherent Improbability.

Inherent improbability relies on the trier of fact's evaluation of the likelihood of the event occurring in the manner described in the testimony. *See Meyer v. United States Customs Service,* 18 M.S.P.R. 545, 546 (1984) (improbable that appellant, a special agent trained in criminal investigations, received government property from the custodian of the property at its storage facility without knowing that it was government property); *Cochran v. Department of Justice, Immigration and Naturalization Service,* 16 M.S.P.R. 343, 348 (1983) (improbable that the witness would run the risk of fabricating a statement when he knew that his memorandum would have to clear two levels of supervision).

7. Demeanor.

Demeanor constitutes the carriage, behavior, manner, and appearance of a witness during testimony. *Dyer v. MacDougal,* 201 F.2d 265, 268-69 (2d. Cir. 1952). Assessment of demeanor depends upon direct observation of the witness during his or her testimony, and, therefore, necessarily depends on demeanor findings made by the administrative judge. *See Weaver v. Department of the Navy,* 2 M.S.P.R. 129, 133 (1980), *aff'd,* 669 F.2d 613 (9th Cir. 1982).

The instant case is one in which the credibility determinations made by the administrative judge are crucial to its outcome. To date, the administrative judge has failed to make findings as to whether the incidents

described in the specifications referring to Captain Daugherty and Ms. Schaefer occurred, and failed to provide an adequate basis for his finding that the appellant did not touch Ms. Byars.

The agency, in a proceeding that is based on charges of sexual harassment under 29 C.F.R. § 1604.11(a), is required to meet the same burden of proof as an individual bringing a complaint of sexual harassment under that regulation.

In proposing the appellant's removal, the agency charged that he "sexually harassed female members of this Command." Agency File, Tab B-9. In its decision letter, the agency cited 29 C.F.R. § 1604.11 for the definition of sexual harassment but also referred generally to OPM, Department of Defense, and Department of the Army regulations based upon it. Agency File, Tab B-1, paragraph 8 at 2. The agency also stated that it found the conduct alleged to come "within this definition." *Id.*, paragraph 9 at 3.

In *Downes v. Federal Aviation Administration*, 775 F.2d 288, 295 (Fed. Cir. 1985), the court held an agency that had charged an appellant with sexual harassment to the same standard as an individual or class of complainants who might bring the charge. Yet in *Carosella v. United States Postal Service*, 816 F.2d 638, 642 (Fed. Cir. 1987), issued after the second initial decision now before the Board, the Federal Circuit stated that an agency is not an Equal Employment Opportunity Commission "complainant," when the agency brings a disciplinary action under Chapter 75 for alleged discriminatory conduct. *Carosella* also reasoned

that an agency may require "certain workplace behavior in furtherance of the efficiency" of its operations and that it need not stay its hand until an employee has violated Title VII. 816 F.2d at 643. Taken together, *Downes* and *Carosella* establish that an agency must meet Title VII's standards when it has explicitly charged the appellant with violating the law, but not when the agency's action rests on its own valid policy or rule.

It is somewhat ambiguous from the agency's notices whether it was proceeding under the EEOC regulation or its own regulations. Because the agency cited only 29 C.F.R. § 1604.11 in its decision letter, we believe that this appeal must be treated as an action brought under that regulation rather than the agency's own regulations. This seems to be the more reasonable and obvious constructing of the notice. Accordingly, the standard articulated in *Downes* -- that the agency must meet the same requirements as a complainant bringing a charge of sexual harassment under Title VII -- applies in the instant case.

The agency's initial burden is to establish, by the preponderance of the evidence, that the allegedly harassing conduct occurred. *See* 5 U.S.C. § 7701(c)(1)(B); *Flores v. Department of Labor*, 13 M.S.P.R. 281, 287 (1982). The agency next must establish, again by the preponderance of the evidence, that the conduct was unwelcome to the individual to whom it was directed, that it was of a sexual nature, and that it unreasonably interfered with the

individual's work performance or created an intimidating, hostile, or offensive working environment. *See Carosella v. United States Postal Service*, 30 M.S.P.R. 199, 201 (1986), *aff'd*, 816 F.2d 638 (Fed. Cir. 1987). *See also Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983).

The administrative judge must determine, on the existing record, whether the agency would have taken this action against the appellant on the basis of any charges sustained.

In *Berube v. General Services Administration*, No. 86-1584, slip op. at 9 (Fed. Cir. June 2, 1987), the Court of Appeals for the Federal Circuit held that an agency must prove, by a preponderance of the evidence, that it would have imposed the same penalty on the basis of only those charges that were sustained. The court further held that the Board lacked the authority to mitigate a penalty imposed under 5 U.S.C. § 7543. *Id.* at 10. If any charges are sustained, the administrative judge shall determine, on the existing record, whether the preponderance of the evidence shows that the agency would have removed the appellant based solely on those charges sustained.

On remand the administrative judge must resolve the disputed issues of fact with respect to the specifications concerning Captain Daugherty, Ms. Byars, and Ms. Schaefer. The administrative judge must address each incident comprising the specifications, with the exception of those portions of the specification pertaining to Ms. Byars previously not sustained by the Board, state whether he finds that the incident occurred, and explain in detail the

basis for his finding. If the administrative judge finds that an incident has occurred, he must analyze it under the analytical framework established for Title VII sex discrimination claims in *Downes v. Federal Aviation Administration*, 775 F.2d 288 (Fed. Cir. 1985).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.